



## FEATURES THIS MONTH

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## NEED GOOD SITES FOR STRATA CORPORATION INFORMATION?

Here are some excellent sites you can access:

- Canadian Condominium Institute: <http://www.cci.ca>
- Condominium Home Owners Association: <http://www.choa.bc.ca/index.html>
- Clark, Wilson, Barristers & Solicitors: <http://www.cwilson.com/stratafaq>
- *Strata Property Act* information web site: <http://www.fic.gov.bc.ca/strata>
- Vancouver Condominium Services: <http://www.vancondo.com>



## 1. LICENSING IS COMING...JANUARY 1, 2006

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As we have said before, we once again remind you that the licensing of strata property management companies and their property agents is scheduled for implementation on January 1, 2006. VCS has been opposed to this concept as we do not believe that it will really do you any good. We have been a lone voice and the battle is over. All we can say now is get ready for it.

Getting ready for it means that VCS will have to change how it administers some aspects of how we manage your strata corporation. The rules are not yet published but we do know that some things which we now do in an "efficient" manner will have to be done in a different "government" manner and that will eliminate the efficiency. That, in turn, of course means higher costs. Other statutory requirements will also be imposed, such as Real Estate Council fees, audits, etc. Again, we do not have details at this time but as soon as we do (probably by September) we will let you know. Suffice it to say for now the government's great new scheme to protect you from yourselves will be expensive.

Getting ready for you means putting more money into your operating budgets. Hate to say it but it is true. Many of the new regulatory costs cannot be absorbed by VCS for two reasons. First, we are not responsible for such costs - they are similar to PST and GST. They are government costs. Second, our profit margins, which are slim to start with, would simply disappear. We would end up like Jetsgo. Gone. It is hard to say how much more money you ought to add into your budgets (Miscellaneous Category Line 7400) and we assume that larger corporations will pay more than small corporations. For now we suggest you do your calculations on the basis of a per unit cost of \$10 per year. For example, if your strata corporation has 75 units, your additional cost per year will be \$750. Add that amount to your projection for line 7400. Please note that we are suggesting this amount only as a best-guess. It is not a quote. It is not a guarantee. Truth is that we will probably not know the actual costs until early 2006. All we are saying at this time is to put something into your budget. You can choose to put nothing in to cover these regulatory costs and simply over-run the budget for the next year, but is that wise? We do not agree that knowingly overspending is a prudent approach but, as always, the final decision about the budget is up to council, not VCS.



Regardless of costs, be prepared for the new licensing regulations as they will affect you in other ways. Management companies will not be allowed to “break the law” and if a council instructs a property agent to do something contrary to the *Strata Property Act*, there will be far-reaching consequences. We will keep you informed throughout the balance of this year whenever we find out details.

Last thought as you groan about all this. The largest theft of strata corporation money (about \$1,000,000) was done by a licensed real estate company. Another high profile theft was perpetrated by a licensed CGA. There is no license for honesty and integrity.

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## 2. APPROVING THE AGENDA: A SIMPLE PROCESS OR...

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In previous bulletins we have commented on the complexities of the *Strata Property Act* and, moreover, the complexities of strata corporation administration. The most innocuous of issues seem to creep into our daily lives when we least expect them and, sometimes, in a manner quite puzzling but giving credence nonetheless to our general observation about the complexity of strata living.

Take for example the routine practice of approving an agenda at an SGM or AGM. It is actually required by a bylaw in the *Strata Property Act* (which most strata corporations have as their bylaws). Bylaw 28 states in part: “(e) *approve the agenda*”. Okay, but exactly what does that mean? Is it just some beaureaucratic nicety, a no-brainer to do item, or does it actually open a door for an owner to make a substantive change? We ask this question because, recently at an SGM of a strata corporation an owner requested the opportunity to amend the agenda to move up item 4 of Business to first place on the agenda. He was told by the chairperson of the SGM that he could not alter the agenda. If that is true, what is the purpose of asking the meeting to approve the agenda? What is it that they are approving? Can they add to it? Can they eliminate items? If so, by what percentage? Would it be a majority vote (50%) or would it be a  $\frac{3}{4}$  vote?

On reflection, the whole concept of approving the agenda is a bit odd. When the legislators in Victoria wrote this bylaw, what was in their minds?

The *Strata Property Act* deals with agendas in several places. First, let us look at Section 46 which states:

- 46      *Agenda and resolutions at an annual or special general meeting*
- (1)      *Subject to subsection (2), the council determines the agenda of an annual or special general meeting.*
  - (2)      *Persons holding at least 25% of the strata corporation's votes may, by written demand, propose a resolution or raise a matter specified in the demand.*
  - (3)      *A resolution or matter raised under subsection (2) must be included*
    - (a)      *in the notice given under section 45 (3) about the next annual or special general meeting of the strata corporation, and*
    - (b)      *on the agenda of that meeting.*

- (4) *Subsection (3) does not apply to a special general meeting held under section 43 (6).*

Section 45(3) by the way states:

- (3) *The notice of the annual or special general meeting must include a description of the matters that will be voted on at the meeting, including the proposed wording of any resolution requiring a 3/4 vote or unanimous vote.*

Section 43(6) states:

- (6) *If a special general meeting is not held within the time period set out in subsection (3), the persons making the demand may themselves hold a special general meeting by complying with the provisions of this Act, the regulations and the bylaws respecting the calling and holding of special general meetings.*

These two sections are not relevant to this article.

So, section 46(1) makes it clear that, with one exception which we will deal with in a moment, the agenda is set by the strata council. So then what is the point of asking the owners to approve the agenda?

Now the exception. There are times in strata corporations when a group of owners is unhappy with something the strata council has or has not done. The statute allows these owners (if they hold at least 25% of the votes) to demand a special general meeting of the strata corporation to consider a resolution or other matter. Fair enough and, in fact, in order to protect that group of owners, the *Act* also states at 43(5):

- (5) *At the special general meeting, the resolution or any other matter specified in the demand is the first item on the agenda and must be dealt with before consideration of any other matter about which notice has been given.*

There is very good reason for this provision. A strata council, upon receipt of such a "demand" (it used to be called a "petition" under the old *Condominium Act*) could load up the agenda of the SGM with a range of other issues and resolutions and place the owners' demand at the very end of the agenda. This would be done in an effort to undermine or thwart an equitable hearing of that demand. The *Act*, therefore, requires that it be the first item on the agenda. Once again then,



what is the purpose of asking the owners to approve the agenda. The owners could not, through this bylaw which is subservient to the *Act* itself, move the item from first place to last place.

Remember that "approving the agenda" is a bylaw. A bylaw can be amended and we recommend it. In our view, asking the owners to approve an agenda is a meaningless exercise.

As an interesting side discussion, not relevant to this article but also found in Section 43 is subsection (4) which states:

- (4) *The president of the council may call the special general meeting without holding a council meeting.*

This is in reference to owner demands (25%) for SGMs.

Council Presidents. Did you know that you are vested with such power? You are, but we recommend that you never use this power. It is there because, in reality, a council does not have any authority to not hold the SGM; nevertheless, we believe that councils as a group should always act as a team.

### 3. OWNERS AS OBSERVERS AT COUNCIL MEETINGS

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On this topic, the bylaw of the previous *Condominium Act* was great. It essentially said that council could “regulate its meetings” as it saw fit. Translated, that meant if a strata council wanted to have a closed meeting it could. Observers could be barred from attending. Under bylaw 17 of the Schedule of Standard Bylaws in the *Strata Property Act*, it’s quite a different story. Subsection (3) says:

(3) *“Owners may attend council meetings as observers”.*

Subsection (4) provides for certain exceptions to this protocol; however, this section applies to a very narrow list of specific topics and not the routine business of a strata council. Accordingly, for the most part, your strata council meetings are essentially open for owners to attend, even if you are dealing with some very sensitive issues that require privacy. For example, council could be in receipt of an engineering report, or correspondence from its legal counsel or even a report from the property manager. All these discussions would be out in the open for all to hear. As you well know, many such discussions have to be treated in a most confidential manner in order to maintain an orderly administration. To put it in the reverse, you well know the consequences of disclosing a policy or a strategy or other business matter to a population which often is not well informed, disinterested in the well being of the strata corporation as a whole and cares only about personal agendas. It takes only one person in a strata corporation to turn it upside down.

Luckily, few owners wish to attend council meetings and when they do it is usually to speak about a specific matter. The normal protocol is to have that person attend as a guest at the start of the meeting and have him or her say their thing and then depart. It works very well. Nevertheless, if an owner demands to attend and observe the entire meeting, you have little choice because of this bylaw. Note that an owner attending has no right to speak to the council on issues being discussed. Easier said than done. We have attended council meetings in strata corporations where an owner, or a group of owners, berates and heckles the council repeatedly throughout the meeting. Councils are powerless to stop this harassment.

Note that this owner privilege is authorized by a bylaw and, as always, bylaws can be amended. The problem is that this bylaw is not easily amended. It has to be voted on as a  $\frac{3}{4}$  Vote Resolution



at an SGM or AGM and any proposals by a council to remove it are usually met with great resistance. They rarely pass. Nevertheless, it is a bad bylaw and VCS recommends that you should remove it at the next opportunity.

Interestingly, the bylaw does not permit the same privilege to tenants. In many aspects of the *Strata Property Act* and its bylaws, the legislation gives tenants the same rights and privileges as owners. It was not done in this case. We believe it was an oversight.

## 4. CHANGES TO THE STRATA PROPERTY ACT COMING SOON (NOT)

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A strata council president, having to deal with a very difficult and recalcitrant owner, phoned our office recently to enquire if a change to the *Strata Property Act* might solve the problem in that strata corporation. The question, of course, was asked more out of frustration rather than any realistic hope that the current problem could be resolved by a change in the legislation.

Nevertheless, it is an understandable frustration that many strata councils face in attempting to administer their corporations, keeping in mind the best interests of the corporation and recognizing the principle of democratic governance along with respect and consideration of minority viewpoints. There are indeed certain aspects of the law (the *Strata Property Act*) that really make it very difficult for strata councils to move forward and achieve results. Unfortunately, some councils decide to ignore the law and charge ahead anyway. Sometimes they "get away with it" and other times it comes back to haunt them. Unfortunately also, is the fact that there is no immediate expectation that the *Strata Property Act* will be amended. That does not mean that you should throw in the towel and give up. In fact, you can do something to bring about change.

Governments tend not to change legislation (such as the *Strata Property Act*) on a very frequent basis. Oh sure, they may tinker with it a bit from time to time but that is usually done to correct blatant errors or to adjust to a significant new court ruling. Any substantive, governmental changes are done about every ten years. Just look at the history of strata legislation. The first statute, plagiarized from the New South Wales (Australia) legislation was introduced in 1966. The NDP made a few important changes in 1977 and the next important change was not done until the *Strata Property Act* came to the surface in 2000. During the intervening years there were few, if any, substantive changes. This is quite remarkable considering the wild growth of condominium housing in B.C. over the past two decades (and which shows no sign of slowing down), but it illustrates exactly how government works, or not.

The 2000 *Strata Property Act* is an excellent piece of legislation, generally, and we do well with it; however, there are many concepts and simple omissions which make strata council administration very cumbersome if not impossible. This results, as noted above, in violations of

the law and/or increased dependence on the law courts or arbitrators or administrators to sort out the messes. These can be very costly remedies as opposed to a change in the statute. To give just one example, take a look at what is generally regarded as the absolutely worst aspect of the *Strata Property Act*. Section 36 requires a strata corporation to make available a wide variety of records and documents to an owner or tenant. This includes "correspondence sent or received by the strata corporation or council".

Many strata councils and management companies have said "yeah right" and simply ignored such requests knowing the horrendous consequences of compliance. (Example: The drug dealer, biker who has a criminal record demands a copy of the letter sent by his neighbour - an elderly single woman who lives next door, who has complained about late night parties and rowdiness).

It is sections such as this that must be changed but you can be sure that the government is in no mood or rush to make changes to the statute on an annual basis. They will be done, if Ministry officials are convinced that changes are necessary, on a five/ten year review basis. What you must do, councils, is write letters. Ministry officials will not change the *Act* if you do not barrage them with correspondence. It does no good to grouse about the failure of the statute at council meetings. You must "write to your MLA". If the MLAs and Ministry officials receive a lot of letters you have a reasonable chance of changing the legislation. Sure, it will take years but it can change. Here is an example of a change that was brought about, not by strata councils, but rather by condominium owners. A change, by the way, that you hate and generally ignore.

Section 158 of the *Act* deals with insurance deductibles and in essence requires the strata corporation to pay for any and all deductibles as a common expense. As noted above, many strata councils choose to ignore the law in this matter and repeatedly instruct the property agent to charge an owner for the deductible because the damage caused was their (the strata lot owner's) fault. Do you know how this section came to be included in the *Strata Property Act*?

Between 1966 and 2000 the Ministry received hundreds of complaint letters from individual owners about mistreatment by their strata councils. Water pipes would break in walls, causing damage, and some councils simply told the affected owners it was their problem. In other cases, the affected owners were actually assessed costs for an event over which they had no control. Other examples were along the lines of fires (usually kitchen fires) where the strata council declined to invoke the benefits of the strata corporation's insurance policy on the (misguided)



notion that "it's the owner's responsibility to make a claim on their own insurance policy". In fact, the insurance on a strata corporation is for all components and when an owner pays his/her strata fees, that includes insurance coverage for their strata lot. These types of incidents happened with such frequency that it generated many letters of protests by individual homeowners to the government. After 10 or 15 years, the file was thick with such complaints so when the new *Strata Property Act* was written, guess what? It corrected the problem.

The point? You can bring about change. It will not happen tomorrow but it can happen. Write your letters.

## 5. SO YOU THINK YOU HAVE A LEAKY CONDO?

By Arthur M. Grant and Derek J. Chapman of the law firm Grant Kovacs Norell

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In the Lower Mainland of British Columbia, the tarps associated with leaky condos are familiar to both strata owners and non-strata owners alike. However, few people are familiar with the various steps that a strata corporation must take to determine whether its strata is, in fact, a leaky condo. In many cases, agreeing to take these steps can be one of the most difficult decisions a strata corporation can make.

Generally, there are three basic steps involved:

- 1) Determining that you might have a problem;
- 2) Retaining qualified professionals; and
- 3) Obtaining a preliminary report.

### 1. Determining that you might have a problem

It cannot be overstated how difficult this first step can be for a strata corporation. Despite evidence of a potential building envelope failure to their strata, many strata owners prefer to be in a state of denial and do not want to acknowledge that they may have a problem. These strata owners fear (correctly) that a leaky condo label will bring a decrease to their property values, large special assessments down the road and a disrupted quality of life when the tarps go up. However, continuing to deny that your strata might be a leaky condo will invariably lead to greater repair costs and greater inconvenience in the future.

Some other strata owners believe they can quickly sell their units at the first sign of trouble and avoid the whole situation by not disclosing the potential building envelope problems to the buyers. In reality, these strata owners will usually end up paying more than anyone else thanks to the lawsuits that will result from angry and deceived buyers of their units.

Of course, a strata corporation has no choice but to investigate and, if necessary, repair a building envelope failure. Specifically, under Section 72 of *Strata Property Act*, the strata corporation is required to repair and maintain common property and common assets:

## Repair of property

*72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.*

It is clear that the building envelope of a strata corporation is “common property” under the *Strata Property Act* and falls within the strata corporation’s statutory duty of repair and maintenance in Section 72.

Some strata owners may argue that their strata was built with a substandard building envelope from the very beginning. They assert that the strata corporation should not, therefore, be required to carry out repairs that will not provide a long-term solution to the problem. However, a strata corporation’s duty to “repair” in Section 72 of the *Strata Property Act* has been given a broad interpretation by the Courts and includes a duty to make good, even if the building was never in good condition in the first place. In the 2002 Supreme Court of British Columbia decision of *Taychuk v. The Owners, Strata Plan LMS744*, Justice Gray adopted a definition of “repair” in Section 72 that meant “making an article good or sound, irrespective of whether the article has been good or sound before”. As a result, the fact that a strata’s building envelope was substandard from the very beginning does not relieve the strata corporation of its statutory duty to bring it up to standard after the fact.

As a result, the only prudent course of action for a strata corporation to take when faced with a potential building envelope failure is to admit that it might have a problem and investigate the problem thoroughly as soon as possible.

There are many tell-tale signs that strata owners and strata agents can look for to determine whether a strata complex may suffer from building envelope failure. These signs include the following:

- The strata was designed using a face-seal stucco cladding system.
- The strata has no or limited overhangs, flat roofs, lots of balconies and skylights, and detailed features.
- There are stains around balconies, windows or other such prominent features.

- There is mildew or mould growing on the inside of the exterior walls of the building, especially in areas shielded from movement of air.
- Double-glazed window seals are failing with condensation inside the window.
- The carpets near exterior walls are damp.
- Recurring complaints of leaks by strata owners.
- Ongoing repair bills for water ingress or water damage issues.

This is not an exhaustive list. Rather, it is intended to be a guide to the sorts of signs that may trigger the realization that a building envelope assessment may be in order.

## 2. Retaining qualified professionals

Once the strata corporation has taken the first step and forms the opinion that it may have a building envelope problem, the second step is to retain qualified reputable professionals to investigate. Typically, these will be professional engineers or architects with a background in the investigation and remediation of building envelope failures. This is an important decision that requires serious thought about the sort of individual the strata corporation will be retaining.

Strata corporations should ensure they do not deal with the problem on an *ad hoc* or patchwork basis. If there is a systemic building envelope problem, it must be addressed in a comprehensive fashion. Similarly, many strata councils have a member who “knows somebody” who can work for cheap. Invariably, this is also a bad idea. Doing it right the first time will always be cheaper in the long run and will be the greatest tool a strata corporation can utilize to regain lost property values down the road.

As a result, once the strata corporation suspects that it may have a building envelope failure that must be investigated, there is no substitute for retaining the services of a qualified, experienced building envelope professional. This may cost a bit more up front, but it will be worth it in the long run. Hopefully, this consultant is one who has experience in the following areas:

- Building envelope remediation work in the locale of the work.
- Expert report and Scott Schedule preparation.

- Testifying in support of litigation (although do not expect experience testifying in support of leaky condo lawsuits).

If it turns out that a strata is a leaky condo, the strata corporation will be embarking on a lengthy period of investigating and repairing the problems, and possibly prosecuting a leaky condo lawsuit. Because all of these stages will require legal advice, it is recommended that a strata corporation seriously consider retaining an experienced construction lawyer prior to retaining a consultant.

Sometimes, a consultant is usually retained by defendants in leaky condo lawsuits and is more “defence-oriented” in their outlook. While such a consultant may provide excellent construction advice, the consultant’s preparation of subsequent reports for the purposes of the lawsuit may prove to be problematic. An experienced construction lawyer should be able to assist the strata corporation in choosing the right consultant.

It is a good idea to obtain some resumés and quotes from the consultants being considered as to their hourly rates and their estimates for a preliminary type of report. Usually, this is done on a letter basis and no formal contract is entered into at this stage.

Once the strata corporation has decided on a particular consultant, it will likely be met shortly after with a request that the strata corporation enter into a formal agreement with the consultant. These are often referred to as “standard form” agreements. However, because these agreements are usually prepared on behalf of the consultant, the strata corporation must ensure that the agreements protect its interest as well. This is another reason why it is important to retain a lawyer at this early stage.

It is important to insist on thorough documentation of the consultant’s assessment, including photos and moisture tests, in order to preserve the ability to document the damages for any potential leaky condo lawsuit in the future. If the consultant does not do this at this stage, the consultant will likely be unable to do it in the future.

It is recommended that the strata corporation also ensure that the consultant will carry out inspections not only to make sure that the design and building codes are complied with, but to

assess where the damage has occurred, what defect or defects have caused the damage, and what may have caused the defects.

### 3. Obtaining a preliminary report

After the strata corporation has chosen a professional building envelope consultant, the third step in determining if you have a leaky condo is to obtain a preliminary report from the consultant. This will involve the consultant arranging to conduct a review of the building. If the strata corporation has specific information about the location and nature of previous problems, it should ensure that the consultant receives this information at or before his or her review.

It is recommended that either the strata agent or a strata representative attend the review with the consultant to accept questions and, if possible, to give answers. It is also recommended to photograph the event and the problems identified by the consultant during the review. These photographs can act as back-up and supplemental documentation.

If the preliminary report indicates that there may be a widespread building envelope problem, the consultant usually requires further comprehensive investigations, often involving destructive testing, to confirm this opinion. The strata corporation will need to get an estimate from the consultant at this point for the associated further investigation report.

If the strata corporation is not happy with the quality of the preliminary opinion by its consultant, it should not be afraid to get a second opinion. However, the strata corporation must be aware that the first report is still a document that should be disclosed to future purchasers and, in the event of a lawsuit in relation to the building envelope, to the parties in that lawsuit

The preliminary report should then be presented to the strata owners and discussed, at least, at an information meeting. The consultant should be present at this meeting to address any questions. Obviously, all strata owners will be very interested in the consultant's preliminary opinion and will want to know what the future holds as far as further investigations, the scope of repair work and the potential cost of the repair work. Often, the consultant will be unable to provide many specific answers without conducting a further more comprehensive investigation. If a special assessment is required in order to conduct the more thorough investigation, then it

might be worthwhile to have the preliminary report presented at a special general meeting or an annual general meeting where further funding can be addressed.

#### 4. Conclusion

Of the three steps discussed above, determining that it might have a building envelope problem is often the most difficult step for a strata corporation to take. However, if tell-tale signs of building envelope failure raise reasonable concerns among the strata owners, the strata corporation has no choice but to act promptly to investigate and, if necessary, fix the problem. Although this is a statutory requirement under the *Strata Property Act*, it will also likely save strata owners money in the long run.

It is also imperative for a strata corporation to retain a qualified professional to carry out a preliminary building envelope investigation. Although retaining the cheapest consultant might appeal to some strata owners, there is no substitute for retaining a qualified consultant who will do the job right the first time. This is the strata corporation's best guarantee that the problem will be properly identified and any repairs, if necessary, will be properly designed and carried out down the road. Such an investment should pay off with the recovery of lost property values in the future.

This article was prepared by ARTHUR M. GRANT and DEREK J. CHAPMAN of GRANT KOVACS NORELL, Barristers & Solicitors, and is intended to provide general information only. It is not intended to provide legal advice with respect to specific issues facing a strata corporation. This article is also copyrighted and may not be reproduced without the written consent of its authors. If you have any questions or comments about this article, please feel free to contact Art at 604-642-6361 ([agrant@gkn.ca](mailto:agrant@gkn.ca)) or Derek at 604-642-6368 ([dchapman@gkn.ca](mailto:dchapman@gkn.ca)).